Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD WILLIAM DUDA, PETITIONER

v.

STATE OF CALIFORNIA, RESPONDENT

ON THE PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE COUNTY OF SANTA CRUZ, STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourth Amendment of the United States Constitution mandate a rule that a peace officer only is permitted to make an arrest for a misdemeanor offense committed in the officer's presence? This precise question was noted, but left unanswered, by this Court in the recent case of Atwater v. City of Lago Vista, 532 U.S. ___, ___, fn.11 (2001) [149 L.Ed.2d 549, 568, fn. 11].

2. Pursuant to the principles of the Fourth Amendment of the United States Constitution which prohibit warrantless arrests within the home, even upon probable cause, in the absence of exigent circumstances, can exigent circumstances dissipate by peace officers engaging in conduct, which unduly and unnecessarily prolongs the ultimate warrantless entry into the house, so as to render the entry unlawful?

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TABLE OF AUTHORITIES

FEDERAL CASES CITED

Atwater v. City of Lago Vista
532 U.S. ___ (2001) [149 L.Ed.2d 549] .. 8, 9

California v. Hodari D.
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Henry v. United States
361 U.S. 98 (1959) 9

Payton v. New York
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Wilson v. Arkansas
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STATE CASES CITED

Dvorin v. Appellate Dept.
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People v. Blackwell
147 Cal.App.3d 646 (1982) 13

People v. Boragno
232 Cal.App.3d 378 (1991) 13

People v. Bradley
132 Cal.App.3d 737 (1982) 13

State v. Storvick
428 N.W.2d 55 (Minn. 1988) 13

FEDERAL CONSTITUTION CITED

United States Constitution, Fourth Amendment passim

FEDERAL STATUTES CITED

18 U.S.C. section 3052 9

28 U.S.C. section 1257, subdivision (a) 1

STATE STATUTES CITED

California Penal Code, section 1538.5 3

California Penal Code, section 1538.5,
subdivision (j) 3

California Vehicle Code, section 20002,
subdivision (a) 2

California Vehicle Code, section 23152,
subdivision (a) 2

California Vehicle Code, section 23152, subdivision (b) 2

STATE RULES OF COURT CITED

California Rules of Court, rule 28(b) 1

California Rules of Court, rule 106 1

TREATISE CITED

LaFave, Search & Seizure (3d ed. 1996). 13

Petitioner Donald William Duda respectfully petitions for a writ of certiorari to review a judgment of the Appellate Division of the Superior Court of Santa Cruz County, State of California.

OPINION BELOW

The opinion of the Appellate Division of the Superior Court of Santa Cruz County, State of California, is unwritten and unreported. (See Cal. Rules of Court, rule 106.) A minute order of the decision of that court appears as Appendix "A" hereto.

JURISDICTION

The judgment of the Appellate Division of the Superior Court of Santa Cruz County, State of California, was entered on May 10, 2001. (Appendix "A".) On June 5, 2001, the Appellate Division of the Superior Court of Santa Cruz County, State of California, certified to the Court of Appeal of the State of California, Sixth Appellate District, all of the issues raised herein. (Appendix "B".) On June 28, 2001, the Court of Appeal of the State of California, Sixth Appellate District, declined to accept certification of the issues herein and denied transfer of the matter to that court. (Appendix "C".) Pursuant to rule 28(b) of the California Rules of Court, the denial of transfer by the Court of Appeal of the State of California, Sixth Appellate District, was the last avenue of appellate review available to petitioner in the appellate courts of the State of California. (See Dvorin v. Appellate Dept., 15 Cal.3d 648, 650 (1975).)

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257, subdivision (a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

HOW THE FEDERAL QUESTION WAS PRESENTED

On March 9, 2000, a criminal complaint was filed in the Santa Cruz County Superior Court, State of California, charging petitioner Donald William Duda with three misdemeanor offenses. Count 1 was a violation of subdivision (a) of section 23152 of the California Vehicle Code for driving under the influence of an alcoholic beverage. Count 2 was a violation of subdivision (b) of section 23152 of the California Vehicle Code for driving with a blood alcohol level of 0.08 percent or more. Count 3 was a violation of subdivision (a) of section 20002 of the California Vehicle Code for hit and run driving with property damage only. As to counts 1 and 2, the criminal complaint alleged a special allegation accusing petitioner of having suffered a prior violation of subdivision (a) of section 23152 of the California Vehicle Code within seven years of the current offenses

charged in counts 1 and 2.

On March 14, 2000, petitioner was arraigned upon the criminal complaint and entered pleas of not guilty to all of the charges and denied the special allegation.

On April 25, 2000, petitioner filed a motion in the Santa Cruz County Superior Court, State of California, to suppress the evidence against him, pursuant to the provisions of section 1538.5 of the California Penal Code, on the grounds of Fourth Amendment violations due to an illegal arrest, search and seizure. The issues raised therein are the identical issues raised in this petition.

On December 1, 2000, and on December 8, 2000, evidence was presented in the Santa Cruz County Superior Court, State of California, in connection with petitioner's motion to suppress evidence on the grounds of Fourth Amendment violations.

On December 12, 2000, the Santa Cruz County Superior Court, State of California, denied petitioner's motion to suppress evidence due to the alleged Fourth Amendment violations.

On December 26, 2000, petitioner timely filed a notice of appeal from the order denying his search and seizure suppression motion, as permitted by the provisions of subdivision (j) of section 1538.5 of the California Penal Code.

On May 10, 2001, the Appellate Division of the Superior Court of Santa Cruz County, State of California, affirmed the order denying petitioner's search and seizure suppression motion. (Appendix

"A".) This appeal raised the precise issues being raised in this petition.

On June 5, 2001, the Appellate Division of the Superior Court of Santa Cruz County, State of California, certified to the Court of Appeal of the State of California, Sixth Appellate District, the issues raised in petitioner's appeal. (Appendix "B".)

On June 28, 2001, the Court of Appeal of the State of California, Sixth Appellate District, declined to accept certification as issued by the Appellate Division of the Superior Court of Santa Cruz County, State of California, and denied transfer of petitioner's matter for decision by the Court of Appeal of the State of California, Sixth Appellate District. (Appendix "C".)

THE PERTINENT FACTS

At approximately 4:15 p.m., on February 24, 2000, Officer Richard Roden of the California Highway Patrol received, and responded to, a dispatch call to go to the residence at 2236 Alice Street in the Live Oak area of Santa Cruz County. At that time Officer Roden was at the CHP office in Aptos. While enroute to 2236 Alice Street, Officer Roden, who was in uniform and in a marked patrol car, and who also was with a partner officer, was delayed on Highway 1 when he stopped to provide some assistance to a disabled motorist. (R.T. 255-256, 258-261.)

Officer Roden and his partner eventually arrived at the area of 2236 Alice Street at approximately 4:40 p.m. At that time Officer Roden contacted a Mr. Ford and a Mr. Landino. Ford said he had witnessed some erratic driving by someone who had been driving the

vehicle that was now parked in the driveway at 2236 Alice Street. The vehicle in question was a 1969 Ford Galaxy. (R.T. 255-256, 258-261.) The erratic driving involved the Ford Galaxy going over the double yellow center line of the roadway a number of times and forcing vehicles from the opposite direction to move out of the way to their right; also, the Ford Galaxy was swerving within its own lane. (R.T. 271; see also p. 3 of petitioner's section 1538.5 suppression motion.)

Landino explained to Officer Roden that he (Landino) was involved in a hit and run accident with the same vehicle. (R.T. 255-256.) Landino said that the vehicle in question had backed out of the driveway at 2236 Alice Street and hit the right rear side of Landino's van. The driver of the Ford Galaxy then pulled back into the driveway, got out of that vehicle and went into the residence at 2236 Alice Street. (R.T. 255-256, 262-263.)

Officer Roden then proceeded to knock on the front door to the residence at 2236 Alice Street several times very loudly and got no response. Also, Officer Roden announced that he was from the Highway Patrol, and he also went to the back door of the residence. Again, Officer Roden got no response. Additionally, Officer Roden saw no movement inside the residence, and he heard no noises inside the residence and heard no sounds of anyone moving around inside the residence. (R.T. 256-257, 264-265, 267-268.) Officer Roden then attempted to locate a neighbor who might know the occupant of the residence at 2236 Alice Street to see if the neighbor could gain entry to the residence. (R.T.

256-257, 265.) When Officer Roden was unsuccessful in that endeavor, Officer Roden, through his dispatcher, contacted his supervisor, Sergeant Jay Ganly; at that time it was approximately 5:20 p.m. (R.T. 257, 265-266.)

Through the dispatcher, Officer Roden described the circumstances of the incident to Sergeant Ganly. (R.T. 257, 265-266.) At that time Sergeant Ganly was involved in the investigation of an accident in the Watsonville area. (R.T. 10.) When Sergeant Ganly heard of the circumstances at 2236 Alice Street, he directed Officer Roden to conduct a surveillance of the residence and not to enter the residence at that time. (R.T. 12-13.)

As Officer Roden waited for his supervisor Sergeant Ganly to arrive at the location, Officer Roden just watched from outside the residence in question to make sure no one went in or out of that residence. Eventually, Sergeant Ganly arrived at the location of the residence at 2236 Alice Street at approximately 5:46 p.m., at which time Sergeant Ganly spoke to Officer Roden and to Ford and Landino. (R.T. 6-7, 12, 251-258, 266.)

Ford related to Sergeant Ganly the erratic weaving pattern that he had seen earlier as he was following the Ford Galaxy. (R.T. 7.) Landino explained the minor collision in which he was involved, and Landino then went on to explain how he (Landino) had attempted to contact the driver of the Ford Galaxy after the minor collision. Landino said that the driver of the Ford Galaxy staggered as he walked, that his balance

was poor, that he had urinated in the crotch of his pants, and that he ignored Landino and went directly into the house, closed the door and locked the door. (R.T. 7.)

Sergeant Ganly then got the telephone number for the residence in question. He called that telephone number but just received the response of an answering machine. Sergeant Ganly also knocked on the front door of the residence loudly, identified himself and indicated that he was from the Highway Patrol. Sergeant Ganly also made contact with a neighborhood lady who also tried to get someone to answer the door at the residence in question; she too was not successful. (R.T. 8.)

Then, Sergeant Ganly decided to force entry into the residence at 2236 Alice Street. By that time there were at least six to seven law enforcement officers at that location including Sergeant Ganly and Officer Roden. (R.T. 9, 18-19, 270.) Eventually, at 6:10 p.m., a window pane on the front door to the residence was broken, the front door was unlocked and Sergeant Ganly went into the premises with some of the other officers. Petitioner was arrested as he walked out of a bedroom. (R.T. 8-9, 17-18, 21-22.) The evidence petitioner sought to suppress was (a) the police observations of petitioner in his house, (b) the police observations of petitioner after he had been removed from his house, (c) the results of a breath test subsequently taken by petitioner, and (d) to the extent that any witness' identification of petitioner was dependent upon observations of petitioner subsequent to petitioner's arrest, all identification testimony of petitioner by any

such witness absent proof of petitioner's identification independent of the observations following petitioner's arrest.

ARGUMENTS

1. No Offense Committed in the Presence of Any Officer:

In this case it is clear that petitioner was arrested for the misdemeanor offense of driving under the influence of alcohol, and for the misdemeanor offense of hit and run driving. However, it is equally clear that no act constituting any part of those offenses occurred in the presence of any of the law enforcement officer or officers involved in the arrest of petitioner.

Although the question of whether the Fourth Amendment entails an "in the presence" requirement for purposes of misdemeanor arrests was recently noted, but left unanswered, by this Court in Atwater v. City of Lago Vista, 532 U.S. ____, ___, fn. 11 (2001) [149 L.Ed.2d 549, 568, fn. 11], a number of other decisions of this Court support petitioner's contention that an "in the presence" requirement is constitutionally compelled with regard to all misdemeanor arrests.

For example, in Payton v. New York 445 U.S. 573 (1980), this Court explained that in interpreting the scope of the Fourth Amendment one needs to examine the common law understanding of an officer's authority to arrest (supra, 445 U.S. at p. 591), and to ascertain whether the issue is one ". . . that can be said to have been definitely settled by the common law at the time the Fourth Amendment was adopted" (supra, 445 U.S. at p. 598). (See also Wilson v. Arkansas, 514 U.S. 927,

931 (1995); California v. Hodari D., 499 U.S. 621, 624 (1991).)

In United States v. Watson, 423 U.S. 411, 418 (1976), this Court clearly and unequivocally said that

> "[t]he cases construing the Fourth Amendment thus reflect the ancient common law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest." (Emphasis added.)

(Accord Payton v. New York, supra, 445 U.S. 573, 590, fn. 30; see also cases cited in Atwater v. City of Lago Vista, supra, 532 U.S. ____, ____ [149 L.Ed.2d 549, 568-569].) Thus, the common law rule, and the Fourth Amendment standard, are that an arrest without a warrant for a misdemeanor is valid only if the misdemeanor is committed in the presence of the arresting officer.

Furthermore, in Henry v. United States, 361 U.S. 98, 100 (1959), this Court said that section 3052 of title 18 of the United States Codes states the federal constitutional standard with regard to arrests. That statute provides that with regard to misdemeanor arrests, the misdemeanor offense must be committed in the presence of the arresting officer. Again, the federal constitutional standard with regard to a misdemeanor arrest without a warrant requires that the misdemeanor offense be committed in the presence of the arresting

officer.

Since, in the instant case, it is undisputed that the misdemeanor offenses for which petitioner was arrested were not committed in the presence of any of the arresting officers, or any other law enforcement officer, petitioner's arrest without a warrant for those offenses was constitutionally invalid. Thus, the "fruits" of that illegal arrest should have been suppressed by the trial court. The claimed "fruits" consist of the observations of petitioner in his house after the entry of the officers, the observations of petitioner by the officers after petitioner's arrest, the results of petitioner's breath tests, and to the extent that any witness' identification of petitioner was dependent upon observations of petitioner subsequent to petitioner's arrest, all identification testimony of petitioner by any such witness in the absence of proof of petitioner's identification independent of the observations following petitioner's arrest.

2. The Warrantless Entry into Petitioner's House Without Any Existing Exigent Circumstances:

It is also petitioner's position that even if the law enforcement officers could lawfully arrest petitioner for a misdemeanor offense not committed in the presence of any law enforcement officer, the police entry into petitioner's house without a warrant was still illegal since by the time the warrantless entry was made there were no exigent circumstances to justify the entry without a warrant at that time.

Preliminarily, it is settled that the Fourth

Amendment of the United States Constitution prohibits warrantless arrests within the home, even upon probable cause, in the absence of exigent circumstances. (See Payton v. New York, supra, 445 U.S. 573, 589-590.)

In this case it is undisputed that when the police made entry into petitioner's residence, the officers had neither an arrest warrant nor a search warrant. (R.T. 23.) Furthermore, there were no exigent circumstances in existence at the time of the ultimate entry at about 6:10 p.m.

In this case, Officer Roden was dispatched to the scene at 4:15 p.m., but did not arrive at the scene until 25 minutes later at 4:40 p.m., due to the fact that he stopped on the way to the scene to render assistance to a disabled vehicle on Highway 1.

After Officer Roden got to the scene, he gathered all of the applicable information from the various witnesses, knocked on the door to the residence and received no response. At that point, Officer Roden did not enter the residence. Instead, he contacted his duty supervisor, Sergeant Ganly. This contact with Sergeant Ganly occurred at approximately 5:20 p.m.

Sergeant Gandly, who was at the scene of a traffic collision in Watsonville, told Officer Roden just to keep the involved witnesses at the scene and to "surveil" the residence until he (Sergeant Ganly) arrived. Eventually, Sergeant Ganly got to the scene at 5:46 p.m., which was some 90 minutes after Officer Roden was first dispatched to the scene. Then, after Sergeant Ganly arrived at the scene he was briefed on what occurred. At that point, Sergeant Ganly, along with some other

officers, attempted to get someone to answer the door at the residence in question. After that failed, Sergeant Ganly and the other officers then entered the premises at 6:10 p.m.

This is not a case where the officers entered petitioner's residence within minutes after the commission of the alleged offense. Nor is this case where subsequent to the commission of the offense, but before the entry into the residence, the officers actually were engaging in a truly, ongoing "field investigation" leading them to petitioner's residence.

In this case the initial officer (Officer Roden) delayed getting to the scene in order to render assistance to an unrelated, disabled vehicle. Then, once at the scene at 4:40 p.m., and after gathering all of the pertinent information, Officer Roden waited more time for the arrival of his supervisor, Sergeant Ganly, who in turn was delayed due to some involvement in an unrelated traffic collision investigation. The total elapsed time between the arrival of Officer Roden at 4:40 p.m., and the arrival of Sergeant Ganly at 5:46 p.m., was just over one hour. The elapsed time from the initial dispatch to the incident, and the arrival of Sergeant Ganly, was just over 1 hour and 30 minutes. Then, Sergeant Ganly waited an additional 20 to 25 minutes before actually entering petitioner's residence. Under these circumstances, although arguably there may have been exigent circumstances at one point in time, the exigencies dissipated by the time Sergeant Ganly made the entry into the residence at approximately 6:10 p.m.

It is settled that when the initial emergency has passed or has dissipated, the defendant regains his or her right to privacy. (People v. Bradley, 132 Cal.App.3d 737, 744-746 (1982); see also People v. Boragno, 232 Cal.App.3d 378, 386-387 (1991); People v. Blackwell, 147 Cal.App.3d 646, 651-652 (1983).) Thus, exigent circumstances justifying an entry without a warrant can disappear or dissipate if the officers wait beyond what is reasonably necessary under the circumstances.

Again, this is not a situation where the field investigation continued nonstop between the moment the authorities were called and when the decision to enter without a warrant was made. As explained hereinabove there was a considerable amount of lag time and down time during which nothing was done while waiting for officers to do other things unrelated to this incident. (See State v. Storvick, 428 N.W.2d 55 (Minn. 1988) [stressing that the field investigation immediately after the accident "continued nonstop to the moment over two hours later when the decision to enter without a warrant was made" to arrest an intoxicated driver in his home]; see also 3 LaFave, Search & Seizure (3d ed. 1996) § 6.1(f), fn. 204, pp. 273-274.) What once may have been exigent circumstances in this matter were gone by the time Sergeant Ganly and the other officers made entry into petitioner's residence at 6:10 p.m.

Since the entry in question was made without a warrant and without exigent circumstances, it was illegal. Thus, all of the "fruits" thereof, as discussed at the end of Argument Number 1 hereinabove, should have been suppressed by the trial court.

CONCLUSION

For the reasons discussed hereinabove, petitioner Donald William Duda respectfully requests this court to grant a petition for writ of certiorari in this matter.

DATED: October 5, 2001

Respectfully submitted,

_____

ARTHUR DUDLEY
Attorney for Petitioner

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ, APPELLATE

CASE NUMBER: AP001164

DATE: 05/10/01

JUDGES: RICHARD J. McADAMS
ROBERT B. ATACK
THOMAS E. KELLY

STATE OF CALIFORNIA

vs.

DONALD WILLIAM DUDA

Counsel addresses the issue(s) now before the Court.

The Court affirms the judgment.

The matter is set for appearances in the Santa Cruz Court on 6/7/01 at 8:30 a.m.

MINUTE ORDER

APPENDIX "A"

FILED
JUN -5 2001
CHRISTINE PATTON, CLERK
BY GLORIA BARNES
DEPUTY, SANTA CRUZ COUNTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CRUZ

PEOPLE,
Plaintiff, No.AP1164

v.

DONALD WILLIAM DUDA
Defendant.
_____/

ORDER ON APPLICATION FOR CERTIFICATION TO COURT OF APPEAL

IT IS HEREBY ORDERED that the Application for Certification to the Court of Appeal is

(X) GRANTED. ( ) DENIED.

DATED: June 5, 2001 /s/ Richard J. McAdams
Judge of the Superior Court

APPENDIX "B"

FILED
6TH DIST COURT OF APPEAL
JUN 28 01
MICHAEL J. YERLY, CLERK

THE PEOPLE, Plaintiff and Respondent, v. DONALD WILLIAM DUDA , Defendant and Appellant.	H023099 (Santa Cruz Superior Ct. No. No. AP1164)

BY THE COURT:

The transfer of this case to this court is denied.

(Premo, Acting P.J., and Mihara, J., participated in this decision.)

Dated Jun 28 2001 /s/ Premo, J. Acting P.J.

APPENDIX "C"